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IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

GWI PCS 1, INC., *et al.*,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Respondent GWI PCS, Inc. (together with its affiliates, "GWI") purchased telecommunications licenses from the Federal Communications Commission (the "FCC"), and paid for them with cash and financing under an installment plan offered by the FCC. Following a drastic decline in the value of these telecommunications licenses, which placed GWI in serious financial distress, GWI was forced to file for Chapter 11 relief. In GWI's bankruptcy case, the FCC filed claims for the balance of the installment payments. During the bankruptcy proceedings, the bankruptcy court adjusted the amount of the FCC's claims based upon a valuation of the underlying assets, and then confirmed GWI's plan of reorganization (the "Plan"). The FCC requested a stay from the bankruptcy court, the district court, and the Court of Appeals, and each of those requests were denied. The FCC elected not to seek a stay or any other form of relief from this Court. Since confirmation and consummation of the Plan in October 1998, GWI has been operating as an ongoing telecommunications company, spending hundreds of millions of dollars to complete its network and conduct its operations. In light of these post-confirmation developments and the disruption to innocent third parties that unwinding the confirmed Plan would cause, both the district court and the Court of Appeals dismissed a portion of the FCC's appeal under the well-accepted bankruptcy appellate doctrine of equitable mootness. The questions presented are:

1. Given the FCC's failure to obtain a stay of GWI's Plan, did the Court of Appeals properly invoke the well-established bankruptcy appellate doctrine of equitable mootness — a doctrine embraced by every court of appeals to have entertained its application — to dismiss the FCC's efforts to unravel GWI's Plan and extract full payment of its claims in violation of applicable bankruptcy law?

2. Given the FCC's failure to appeal the bankruptcy court's method of valuing the licenses for purposes of adjusting the FCC's claims under applicable bankruptcy law, did the Court of Appeals properly decline to defer to the FCC's self-serving interpretation of its own regulations promulgated in specific response to the outcome of the litigation in the bankruptcy court?

## STATEMENT PURSUANT TO RULE 29.6

Petitioner is the United States of America acting on its own behalf and that of the FCC (collectively "Petitioner" or the "government"). Respondents are General Wireless, Inc., GWI PCS, Inc., GWI PCS 1, Inc., GWI PCS 2, Inc., GWI PCS 3, Inc., GWI PCS 4, Inc., GWI PCS 5, Inc., GWI PSC 6, Inc., GWI PSC 7, Inc., GWI PCS 8, Inc., GWI PCS 9, Inc., GWI PCS 10, Inc., GWI PCS 11, Inc., GWI PCS 12, Inc., GWI PCS 13, Inc., and GWI PCS 14, Inc. Pursuant to Rule 29.6, the following is a list of the parent companies and subsidiaries of each Respondent.

General Wireless, Inc.[1] is the parent corporation of three wholly-owned subsidiaries, GWI PCS, Inc., GWI PCS Chico, Inc., and Reauction Inc. GWI PCS, Inc. has two wholly-owned subsidiaries, GWI PCS California/Florida, Inc. and GWI PCS Georgia, Inc. GWI PCS California/Florida, Inc. is the direct parent corporation of GWI PCS 1, Inc., GWI PCS 3, Inc., GWI PCS 4, Inc., GWI PCS 5, Inc., GWI PCS 6, Inc., GWI PCS 10, Inc., GWI PCS 11, Inc., GWI PCS 12, Inc., GWI PCS 13, Inc. and GWI PCS 14, Inc. GWI PCS Georgia, Inc. is the direct parent corporation of GWI PCS 7, Inc., GWI PCS 8, Inc. and GWI PCS 9, Inc. GWI PCS Chico, Inc. is the direct parent corporation of GWI PCS 2, Inc. No publicly held company owns 10% or more of any of the Respondents' stock or any of the stock of their respective parents or subsidiaries.

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1. In 1999, General Wireless, Inc. formally changed its name to MetroPCS, Inc. Certain of its direct and indirect subsidiaries also changed their names, as follows: GWI PCS Chico, Inc. is now MetroPCS Chico, Inc.; GWI PCS, Inc. is now MetroPCS Wireless, Inc.; GWI PCS California/Florida, Inc. is now MetroPCS California/Florida, Inc. and GWI PCS Georgia, Inc. is now MetroPCS Georgia, Inc. However, as all of the proceedings and opinions below refer to the "GWI" entities, for purposes of these proceedings, the Respondents use the former corporate names for ease of reference.

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## DECISIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-47a) is reported at 230 F.3d 788. The opinion of the district court (Pet. App. 49a-59a) is reported at 245 B.R. 59. The opinions of the bankruptcy court (Pet. App. 60a-100a, 101a-123a, 124a-126a, 127a-166a) are unreported.

## STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on October 20, 2000. The court denied the FCC's petition for rehearing and rehearing en banc on December 22, 2000. On March 14, 2001, Justice Scalia extended the government's time to file a petition for a writ of certiorari, which was thereafter timely filed. The government invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The pertinent provisions of the Bankruptcy Code omitted from the Petition are reprinted in the appendix hereto.

## STATEMENT OF THE CASE

This matter arises out of GWI's chapter 11 bankruptcy proceedings in which the FCC was a creditor, having filed claims against GWI aggregating approximately $1 billion. The relevant dispute centers on the bankruptcy court's application of ordinary principles of bankruptcy law to restructure GWI's debt to the FCC, and the finality of this restructuring given the FCC's failure to obtain a stay enjoining the confirmation and consummation of GWI's plan of reorganization (the "Plan"). GWI's debt to the FCC arose from GWI's purchase of telecommunications licenses, financed in part by credit the FCC itself provided.

Pursuant to § 309(j) of the Communications Act, the FCC is authorized to sell by auction licenses covering certain prescribed "blocks" of the electromagnetic spectrum suitable for personal communications services ("PCS").[2] 47 U.S.C. § 309(j). Section 309(j) requires the FCC to design such auctions in a manner that "ensure[s] that small businesses . . . are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). Pursuant to this directive, the FCC reserved the C and F-Blocks for small businesses such as GWI. *See* 47 C.F.R. § 24.709.[3]

In May 1996, GWI participated in the FCC's C-Block auction and was the high bidder for fourteen licenses with an aggregate bid of approximately $1.06 billion. Pet. App. 4a. Although GWI was the high bidder for these licenses, the FCC did not immediately award the licenses to GWI, nor was GWI required to pay for them until they were granted. Rather, GWI's high bid merely gave it the right to apply for the licenses, which GWI did on May 22, 1996.

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2. Specifically, Congress authorized the use of competitive bidding to auction spectrum licenses, so long as in doing so the FCC implemented the following objectives: (a) development and rapid deployment of new technologies, products and services without administrative or judicial delays; (b) promotion of economic opportunity and competition while avoiding excessive concentration of licenses by disseminating licenses to a wide variety of applicants including, importantly, small businesses; (c) recovery for the public of a portion of the value of spectrum; and (d) efficient and intensive use of the spectrum. *See* 47 U.S.C. § 309(j)(3)(A)-(D). In providing this authorization, Congress specifically directed the FCC not to consider revenue collection in conjunction with license allocation. *See* 47 U.S.C. § 309(j)(7)(A) ("[T]he Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding.").

3. To be eligible as a small business, the bidder could not have more than $125 million in revenues or $500 million in assets. *See* 47 C.F.R. § 24.709(a)(1).

In prior auctions, the FCC had moved promptly to complete the licensing process before commencing a new round of auctions.[4] This practice enabled bidders to obtain their licenses and secure financing to build out their networks *before* the FCC released new licenses into the market. In the case of the C-Block, however, the FCC conducted auctions of *nearly 1500* additional licenses, comprising the D, E and F-Blocks, prior to granting the vast majority of C-Block licenses, including those issued to GWI. The market's reaction to this flood of additional licenses was swift and predictable; the value of PCS licenses dropped precipitously by over 75 percent.[5]

Just after the conclusion of the D, E and F-Block auction, on January 27, 1997, the FCC granted GWI its licenses (almost nine months after the close of the auction). Pet. App. 5a. GWI completed payment of the $106 million cash portion of its license debt and executed promissory notes to the FCC for the balance of the purchase price (approximately $954 million). Pet. App. 5a-6a. The FCC took security interests in the licenses to secure repayment of the notes.

Thereafter, GWI struggled to obtain financing to build out its network and execute its business plan. Although the financial community had been eager to fund GWI's

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4. For example, the A and B-Block auction ended on March 13, 1995. Despite challenges to various of the applications, the licenses were granted on June 23, 1995 — just 3 months later.

5. By the close of the auction in May of 1996, the average price for C-Block licenses was $1.33 per MHz-pop. Subsequently, the D, E, and F-Block licenses sold for an average price of $0.33 per MHz-pop. *See generally* Pet. App. 6a n.7. MHz-pop is a calculation that equates license prices by comparing different bandwidths (10, 15 or 30 MHz) with the population concentration (pops) of the geographic area covered by the license. Pet. App. 3a n.1.

operations before the FCC flooded the market with additional licenses, it was no longer willing to do so after the market's collapse.[6]

Strapped for financing, GWI faced two choices: (i) abandon operations, terminate its employees, forfeit the $106 million it had already paid toward its licenses, and go out of business, or (ii) attempt to restructure its debts under the provisions of chapter 11 of the Bankruptcy Code. After struggling for months, in October 1997, GWI filed for bankruptcy relief. Pet. App. 7a-8a.[7]

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6. Prior to the market's collapse, innumerable C-Block licensees had filed various documents with the Securities and Exchange Commission for over $1.5 billion in public debt and equity offerings. Not a single public equity or bond offering was ultimately executed. Further, of the 493 C-Block bidders that acquired the right to apply for licenses in 1996, by April of 1998, 94% of the relevant licenses were not in use. Pet. App. 141a.

7. Just prior to GWI's bankruptcy filing, the FCC announced that it would allow licensees to make certain elections regarding license return and deposit forfeitures; which elections ultimately had to be made by June 8, 1998 (a date by which GWI was already proceeding toward confirmation of its Plan). The FCC made clear that its elections did not supplant a company's right to seek federal bankruptcy relief:

> It may well be, however, that our menu approach does not appeal to every licensee and that some C-Block licensees will reject all the options and go into bankruptcy. This is neither a surprise to me nor a development that causes me any serious alarm . . . [B]ankruptcies are a normal activity of our commercial world and, in our role as lender, should be expected.

*In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, 12 FCC Rcd. 16,436, 1997 WL 643811 (rel. Oct. 20, 1997) (Separate Statement of Commissioner Rachelle B. Chong) at 5.

Once in bankruptcy, GWI sought to restructure its debts in accordance with ordinary principles of bankruptcy law. As is most relevant here, GWI initiated a proceeding under § 548 of the Bankruptcy Code to avoid a portion of its debt to the FCC as a constructively fraudulent transfer. Pet. App. 8a. In pertinent part, § 548 permits an insolvent debtor to avoid certain obligations incurred for less than reasonably equivalent value. *See* 11 U.S.C. § 548(a)(1)(B). In this case, although GWI's fourteen licenses may have been worth $1.06 billion at the close of the auction in May 1996, by the time the FCC actually issued the licenses to GWI almost nine months later, their value had dropped to $166 million. Pet. App. 8a-9a. Consequently, when GWI executed and delivered its notes to the FCC, it became obligated to pay $954 million ($1.06 billion less $106 million in downpayments) for licenses worth a mere fraction of this amount. Because GWI was rendered insolvent as a result, § 548(a)(1)(B) permitted its obligation to be restated at the actual value of the licenses.[8] The bankruptcy court so concluded, and on April 24, 1998, the court issued an order adjusting GWI's debt under the notes to $166 million, the actual value of the licenses (the "Section 548 Decision"). Pet. App. 126a.

Following the Section 548 Decision, GWI filed a plan of reorganization. Under the Plan, GWI proposed to pay the FCC the adjusted amount of its claims, retain its licenses, and implement its business plan. *See* 11 U.S.C. §§ 1123(a)(5) & (b)(5). GWI also proposed to raise additional financing to build out its telecommunications network, purchase necessary equipment, and pay its general creditors in one of

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8. The FCC never challenged on appeal either GWI's insolvency or the $166 million valuation of the licenses. Pet. App. 34a-35a.

two ways: in cash on an immediate, discounted basis,[9] or over time through distributions from an $18 million unsecured creditors' fund (the "Creditors' Fund").[10]

The FCC objected to GWI's Plan in the bankruptcy court. Although the FCC based its objection on several grounds, it focused primarily on the Plan's implementation of the Section 548 Decision, which the FCC had previously appealed. Pet. App. 83a-87a. The bankruptcy court resolved the FCC's objections by modifying the terms of the Plan regarding the treatment of the FCC's claims.

Because the FCC's claims were secured by liens on GWI's licenses, the bankruptcy court directed a valuation of the licenses in accordance with § 506(a) of the Bankruptcy Code in order to determine the proper treatment of the FCC's claims under the Plan. Pet. App. 86a. As is relevant here, § 506(a) bifurcates the claim of a secured creditor into two separate claims: (i) a secured claim equal to the value of the creditor's underlying collateral (here, the licenses), and (ii) an unsecured claim for the remaining deficiency, if any. *See Associates Commercial Corp. v. Rash*, 520 U.S. 953, 961 (1997) (explaining the operation of § 506(a)); *see also* 11 U.S.C. § 506(a). In turn, applicable bankruptcy law requires the full payment of the creditor's secured claim, *see* 11 U.S.C. § 1129(b)(2)(A), but not necessarily any unsecured deficiency, which may be treated and discharged for less than full payment as authorized under the Bankruptcy Code.

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9. For example, Hyundai Electronics of America, one of GWI's other large creditors, accepted $28 million to resolve its claim of approximately $50 million. Pet. App. 110a.

10. Under the Plan, unsecured creditors received their pro rata share of this $18 million fund. Depending upon the amount of claims ultimately allowed, distributions to creditors would range from 2% to 100% of allowed claims.

Applying § 506(a), the bankruptcy court determined that GWI would be required to pay the FCC's secured claim in an amount equal to the greater of (i) the bankruptcy court's previous valuation of the licenses at $166 million, or (ii) the market value of the licenses determined by reference to the price obtained for the same kind of licenses at a contemporaneous auction. Pet. App. 84a.[11] The court also found that, in the event the Section 548 Decision were overturned on appeal, the FCC would be entitled to an unsecured deficiency claim in an amount equal to (i) the total amount of the FCC's claims, less (ii) the amount of the secured portion of its claims. Under the court's ruling, any unsecured deficiency claim would receive the same treatment as other unsecured claims under the Plan (i.e., a pro rata share of the Creditors' Fund). Pet. App. 84a-85a. On this basis, the court confirmed GWI's Plan (the "Confirmation Decision").

As a result of the Confirmation Decision, the FCC faced two possible outcomes. If the Section 548 Decision were affirmed on appeal, the FCC would be entitled to recover from GWI the full value of its secured claim of $166 million, but the FCC would not have an unsecured deficiency claim as any deficiency would remain avoided under § 548(a)(1)(B).[12] Alternatively, if the Section 548 Decision

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11. The relevant auction took place in April 1999 (the "1999 Auction"). The results of this auction established the market value of GWI's licenses at $69 million, as opposed to the $166 million value the bankruptcy court had initially determined. Pet. App. 16a-17a. Under the terms of the Confirmation Decision, however, the FCC's secured claim remained at $166 million in spite of the unequivocal market evidence that, at that time, GWI's licenses were worth only approximately 40% of that amount.

12. Under this procedure, if the 1999 Auction results established the value of the licenses at $1 billion, the FCC would have been

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were overturned, the FCC would be entitled to recover both the full amount of its secured claim (as determined by reference to the market test the bankruptcy court established) under § 506(a), plus, an unsecured deficiency claim, if any, to be paid out of the Creditors' Fund. Pet. App. 16a-17a.

To protect itself in the event the Section 548 Decision were overturned, the FCC could have taken an election under § 1111(b) of the Bankruptcy Code to have the amount of its secured claim fixed conclusively in an amount equal to the total amount of its claims, regardless of the value of the licenses.[13] The FCC, however, did not make this election,[14] and, thus, § 506(a) properly controlled the treatment of its claims under the Plan.

As part of the Confirmation Decision, the bankruptcy court also enjoined the FCC from canceling GWI's licenses for failure to pay more than the adjusted amount of the

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(Cont'd)

entitled to receive payment in full of a $1 billion secured claim. As indicated above, however, the results of the 1999 Auction demonstrated a value far less than $166 million. *See supra* note 11. Accordingly, under the Confirmation Decision, the FCC's secured claim was fixed at $166 million.

13. Under § 1111(b), a secured creditor such as the FCC may elect to have the amount of its secured claim fixed at the total amount of its claim (here $954 million, or $1 billion less amounts already paid) as opposed to the value of its collateral (here, $166 million). *See* 11 U.S.C. § 1111(b).

14. Federal Rule of Bankruptcy Procedure 3014 requires any election pursuant to § 1111(b) to be made in writing prior to the conclusion of the hearing on approval of the disclosure statement accompanying a plan of reorganization. *See* Fed. R. Bankr. P. 3014. The FCC fully participated in GWI's disclosure statement hearing, but never made such an election. Hence, the right to make such an election was waived.

FCC's claims. Pet. App. 118a. In doing so, the court merely implemented the provisions of § 525(a) of the Bankruptcy Code, which expressly prohibit a governmental unit from canceling a license for the debtor's failure to pay a debt that may be discharged in bankruptcy. *See* 11 U.S.C. § 525(a).

The FCC appealed the Confirmation Decision to the district court, which consolidated the matter with the FCC's prior appeal of the Section 548 Decision. Thereafter, the FCC sought a stay to prevent GWI from implementing its Plan, arguing that, once GWI did so, the FCC's appeals would become moot. Although GWI agreed with the FCC that its appeals would likely become moot in the absence of a stay, GWI nevertheless opposed the issuance of a stay for compelling business reasons,[15] and also because the FCC did not satisfy the legal requirements for a stay.[16] After granting interim stays to evaluate the merits of the FCC's requests, the bankruptcy court, the district court, and the Court of Appeals each declined to enter a further stay. Pet. App. 17a-18a.

The FCC did not seek a stay or other form of relief from this Court.

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15. GWI was required to move forward with the build-out of its network because it had a limited time to do so or it would lose its licenses. Pet. App. 91a-93a. In fact, GWI is required to complete the build-out of a substantial portion of its network so as to be capable of providing service to one-third of the population in each of its fourteen license areas, which include San Francisco, Miami and Atlanta, by January 2002.

16. The test in the Fifth Circuit for granting a stay is substantially similar to that used in every other circuit: (a) irreparable harm to the movant if the stay is not granted; (b) no substantial harm to other parties if the stay is granted; (c) a likelihood of success on the merits of the appeal; and (d) service to the public interest from granting the stay. *See Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1067 (5th Cir. 1986).

After the government advised GWI that it would not seek a stay in this Court, GWI proceeded to implement its Plan as required by law. *See* 11 U.S.C. § 1142(a) (directing the reorganized debtor to implement its plan).[17] Likewise, by operation of law, the Plan became binding on all parties, including GWI and the FCC. *See* 11 U.S.C. §§ 1141(a) & 106(a)(1). Moreover, after the passage of 180 days from the date of confirmation, GWI's Plan could no longer be revoked for any reason. *See* 11 U.S.C. § 1144. In addition, pursuant to § 1127, once GWI began managing its assets after confirmation and making distributions to creditors, it could no longer modify its Plan. *See* 11 U.S.C. § 1127.

For almost a year, with no stay in effect, GWI proceeded to build out its network, and engaged in thousands of transactions with hundreds of third parties.[18] Subsequently, on September 27, 1999, the district court determined that GWI had substantially consummated its Plan and that innumerable third parties would suffer irreparable injury if the FCC were permitted to enforce its claims in a manner inconsistent with the Plan. Pet. App. 56a. Accordingly, in addition to affirming the Section 548 Decision, the court dismissed the FCC's remaining appeals as "equitably moot." Pet. App. 57a.

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17. Thereafter, GWI closed the myriad transactions contemplated under the Plan, which resulted in substantial consummation of the Plan under § 1101 of the Bankruptcy Code. Section 1101 defines "substantial consummation" as: (A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan. *See* 11 U.S.C. § 1101(2). There is no credible disagreement that GWI's Plan was substantially consummated in 1998.

18. *See* Pet. App. 18a-19a. To date, GWI has raised over $500 million (over $120 million of which has been paid to the FCC), has offices in four states, several hundred employees and subcontractors, and is implementing over 600 construction contracts at various sites.

On further appeal to the Fifth Circuit, the FCC argued that the doctrine of equitable mootness should not apply in this case because the doctrine's requirements had not been satisfied, and in any event, should not apply to the FCC. Alternatively, the FCC argued that the bankruptcy court improperly applied § 548(a)(1)(B) to adjust the amount of its claims on the theory that, under the FCC's interpretation of its regulations, GWI became obligated to pay for the licenses in May of 1996 when the licenses were worth $1.06 billion, rather than when the FCC actually awarded the licenses to GWI in 1997 when they were admittedly worth $166 million.

Rejecting these arguments, the Court of Appeals determined that the doctrine of equitable mootness applied in this case, and that the FCC's effort to obtain full payment of its claims should be dismissed in light of three factors: (i) the FCC failed to obtain a stay to prevent GWI from consummating its Plan; (ii) GWI had entered into numerous transactions with third parties in reliance on the Plan resulting in substantial consummation of the Plan; and (iii) GWI's Plan would completely unravel if the FCC could force GWI to pay the full amount of its claims, resulting in irreparable harm to all of the third parties who relied on the Plan. Pet. App. 23a-29a. Likewise, the court concluded that the FCC could not establish May 8, 1996 (the close of auction) as the date GWI became obligated to pay for its licenses solely on the basis of the agency's self-serving *post hoc* interpretation of its own regulations because this interpretation was nothing more than a convenient litigation position. Pet. App. 36a-38a. Thereafter, on December 22, 2000, the court denied the FCC's petition for rehearing and rehearing en banc. Pet. App. 177a.

Significantly, the FCC did not preserve for appeal any issue regarding the bankruptcy court's valuation of the licenses, or the application of the court's § 506(a) procedure. Accordingly, these arguments have been waived.

## REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals is correct and does not conflict with the decision of any other court of appeals or this Court. Further, this case does not present a question of exceptional importance necessitating further review. Rather, it involves merely the efforts of a creditor to recover more on its claims than it is entitled to receive under applicable bankruptcy law.

After the collapse of the PCS license market, GWI filed for bankruptcy relief in an effort to restructure its financial affairs. Although the government obliquely questions GWI's motives in doing so, there is no basis for the government's inferences. GWI's bankruptcy proceedings were conducted in conformity with every legal and equitable requirement. Indeed, the government cannot now and has never been able to legitimately challenge GWI's good faith.[19] In reality, the government's true quarrel lies with the way in which bankruptcy law restructures its claims and affords finality to GWI's unstayed, consummated Plan.

Having agreed to finance a portion of GWI's debt for its licenses, and having created the financial crisis that led to GWI's bankruptcy filing, the FCC should not now be heard to complain about the application of ordinary principles of bankruptcy law to its claims. More important, given the government's failure to take certain steps to preserve its rights

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19. When challenged by the panel of the Court of Appeals at oral argument to substantiate its constant implications of wrongdoing or "speculation" on the part of GWI, which the government even continues in the Petition, counsel for the FCC readily conceded that any such contention was baseless: Court: "There's no evidence and you don't contend that this was a nefarious plot to go in and bid on [the licenses] at 1.06 billion, knowing they're going to go into bankruptcy?" Counsel for the FCC: "No. That's correct. We don't contend that." Oral Argument Transcript at 20.

in the event it were successful in overturning the Section 548 Decision (including the government's failure to seek a stay from this Court, its failure to make a § 1111(b) election, its failure to contest the bankruptcy court's § 506(a) valuation procedure, and its failure to appeal the bankruptcy court's injunction preventing cancellation of the licenses), it is doubtful that the questions raised are properly presented for review. These waivers also render review unnecessary because, even if the FCC were to prevail, the outcome with respect to the FCC's claims would remain substantially the same. Further, following the conclusion of the litigation in the bankruptcy court, the FCC changed its rules to eliminate its role as a creditor in the sale of licenses. As such, the issues presented in this case are not likely to recur. For each of these reasons, further review in this Court is not warranted.

## I. THE DOCTRINE OF EQUITABLE MOOTNESS IS WELL-ESTABLISHED AND STATUTORILY SUPPORTED, AND THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS OR OF THIS COURT.

### A. Eleven Courts of Appeals Have Adopted the Equitable Mootness Doctrine.

Equitable mootness is a well-established bankruptcy doctrine grounded on the basic principle that there is a point beyond which an appellate court should not order fundamental changes to a confirmed chapter 11 plan. As the courts have recognized, the doctrine derives from "concerns unique to bankruptcy proceedings." *In re Manges*, 29 F.3d 1034, 1038 (5th Cir. 1994), *cert. denied*, *Manges v. Seattle-First Nat'l Bank*, 513 U.S. 1152 (1995). Under the doctrine,

> a reviewing court may decline to consider the merits of a confirmation order when there has been substantial consummation of the plan such that

> effective judicial relief is no longer available . . . [without imposing adverse and inequitable consequences upon] . . . third parties who are not before the reviewing court but who have acted in reliance upon the plan as implemented.

*Id.* at 1039; *see also In re Continental Airlines Inc.*, 91 F.3d 553, 558-59 (3d Cir. 1996), *cert. denied*, *Bank of N.Y. v. Continental Airlines*, 519 U.S. 1057 (1997) ("Under this widely recognized and accepted doctrine, the courts have held that '[a]n appeal should . . . be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable [to third parties not before the court].' " (quoting *In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993))).

Although the government criticizes the lower courts' use of equitable mootness in this case, it does not deny that every court of appeals to have addressed the doctrine on its merits has embraced its application. *See Continental Airlines*, 91 F.3d 553 (3d Cir. 1996); *Manges*, 29 F.3d 1034 (5th Cir. 1994); *In re UNR Indus., Inc.*, 20 F.3d 766 (7th Cir.), *cert. denied*, *UNARCO Bloomington Factory Workers v. UNR Indus., Inc.*, 513 U.S. 999 (1994); *In re Chateaugay Corp.*, 988 F.2d 322 (2d Cir. 1993); *In re Public Serv. Co. of N.H.*, 963 F.2d 469 (1st Cir.), *cert. denied*, *Rochman v. Northeast Util. Serv. Co.*, 506 U.S. 908 (1992); *In re Club Assocs.*, 956 F.2d 1065 (11th Cir. 1992); *Central States, Southeast and Southwest Areas Pension Fund v. Central Transp., Inc.*, 841 F.2d 92 (4th Cir. 1988); *In re AOV Indus., Inc.*, 792 F.2d 1140 (D.C. Cir. 1986); *In re Information Dialogues, Inc.*, 662 F.2d 475 (8th Cir. 1981); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981); *In re Eagle Picher Indus., Inc.*, No. 96-4039, 97-4260, 1998 WL 939869 (6th Cir. Dec. 21, 1998) (unpublished disposition). Accordingly, the government cannot properly say that the legitimacy of the doctrine is the subject of any conflict among the courts of appeals.

Nor can the government successfully contend that the application of the doctrine in this case truly conflicts with its application by any other court. Lacking such a conflict, the government attempts to create one with the statement that the Fifth Circuit's decision "effectively" conflicts with the Second Circuit's opinion in *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999). The Court will search in vain, however, for any mention of the equitable mootness doctrine in the *NextWave* opinion precisely because the opinion addresses jurisdictional issues and has nothing to do with mootness. Indeed, in opposing review of the *NextWave* decision in this Court, the government was quite adamant in its assertion that no conflict exists between the Fifth and Second Circuits:

> Finally, we note that, on October 20, 2000, the Fifth Circuit issued a decision in *GWI PCS 1 Inc.*, No. 99-11294, 2000 WL 1528690. Although that decision rejected the government's challenge to a confirmed plan of reorganization and allowed a C-Block bidder to retain 14 broadband PCS licenses while avoiding much of the debtors' bid obligation, the decision does not directly conflict with the decision below [in *NextWave*] on the issue raised in the petition. Indeed, in *GWI*, the Fifth Circuit rejected the government's challenge to the bankruptcy court's confirmation order not because it disagreed with the Second Circuit's decision in this case, but rather because it found that the government's challenge to the bankruptcy court's ruling had become "equitably moot." . . . As the Fifth Circuit recognized . . . equitable mootness principles have no application to the present case [involving *NextWave*], because petitioner's plan of reorganization was never confirmed.

Brief for the Federal Communications Commission in Opposition, *NextWave Personal Communications Inc. v. FCC*, No. 00-447, ("FCC NextWave Cert. Opposition") at 28-29.

Lacking any semblance of a true conflict, the government nevertheless asserts that this case merits review because courts "have not always agreed about the limits of the doctrine or the factors dictating its application." Pet. at 22. In support of this contention, the government apparently relies on minor differences in language plucked selectively from the voluminous case law surrounding the doctrine. The government's efforts to establish a conflict out of these variations, however, is illusory. In reality, there is no conflict among the judgments of the courts of appeals.

### B. The Doctrine of Equitable Mootness is Fundamentally Supported in the Bankruptcy Code.

Lacking any genuine conflict of authority among the courts of appeals (or with the precedents of this Court), the government seeks further to justify its request for review with the visceral characterization of the doctrine as purely a "judge-made" construct rooted in misplaced notions of equity. In truth, however, the doctrine is thoroughly supported by the statutory text of the Bankruptcy Code, and is essential to fulfill Congress's statutory objectives incident to the confirmation of a chapter 11 plan.

As the courts have recognized, use of the doctrine to avoid unraveling confirmed plans of reorganization is based on "the important policy favoring finality in bankruptcy proceedings." *Public Serv. Co.*, 963 F.2d at 474. Rigorous application of the doctrine to achieve finality in the handling of plans is necessary to protect not only the interests of the debtor and third parties, but also the strong public policy of promoting successful business reorganizations. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984). In the absence of some meaningful limitation on the ability of an appellant to unwind a plan after it has been substantially

consummated, reorganization would be impossible in the vast majority of cases. As the Seventh Circuit explained, unless there is some predictable way for a reorganized debtor to put its bankruptcy behind it, third parties will likely shun the debtor's business.

> [I]t is the reliance interests engendered by the plan, coupled with the difficulty of reversing the critical transactions, that counsels against attempts to unwind things on appeal. Every incremental risk of revision on appeal puts a cloud over the plan of reorganization, and derivatively over the assets of the reorganized firm. People pay less for assets that may be snatched back or otherwise affected by subsequent events.

*In re UNR Indus., Inc.*, 20 F.3d 766, 770 (7th Cir.), *cert. denied, UNARCO Bloomington Factory Workers v. UNR Indus., Inc.*, 513 U.S. 999 (1994).

Moreover, wholly apart from the policies underlying the doctrine of equitable mootness, its critical requirements also derive directly and precisely from the text of the Bankruptcy Code itself. In applying the doctrine, courts consider three factors: "whether (1) a stay has been obtained, (2) the plan has been substantially consummated, and (3) the relief requested would affect either the rights of parties not before the court or the success of the plan." Pet. App. 22a. The first factor simply recognizes that, by obtaining a stay, a litigant may forestall the harm that the Code and the doctrine seek to avoid in the first place. The second factor derives directly from §§ 1101 and 1127 of the Code, and the third factor implements § 1144.

The Code expressly defines the concept of substantial consummation in § 1101(2).[20] In addition, the Code establishes that this definition exists specifically to inform application of § 1127(b), which proscribes modification of a plan after substantial consummation has occurred.[21] Following confirmation, § 1142 directs the debtor to implement the plan,[22] and § 1144 sharply limits the ability of the court to revoke a confirmation order. Specifically, the court may revoke confirmation only within 180 days, and only for reason of fraud. *See* 11 U.S.C. § 1144. Significantly, even in revoking confirmation for fraud, the court is directed "to protect any entity acquiring rights in good faith reliance on the order of confirmation." 11 U.S.C. § 1144(1).

In turn, the requirement of a stay recognizes not only the difficulty of unwinding consummated plans but also the policy of preserving reliance on the finality of confirmation orders entered by the bankruptcy court. Pet. App. 23a (quoting *In re Berryman Prods. Inc.*, 159 F.3d 941, 944 (5th Cir. 1998)). While the FCC sought stays from the lower courts, ultimately

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20. *See supra* note 17.

21. Section 1127(b) provides: "The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and *before* substantial consummation of such plan. . . ." 11 U.S.C. § 1127(b) (emphasis added).

22. Specifically, § 1142(a) provides in mandatory terms that, "[n]otwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor . . . shall carry out the plan and shall comply with any orders of the court." 11 U.S.C. § 1142(a). In turn, § 1141(a) expressly binds all parties to a confirmed plan "whether or not such creditor, equity security holder, or general partner has accepted the plan." 11 U.S.C. § 1141(a). Similarly, by operation of law, confirmation of the plan also releases the debtor and its property from any and all claims or other obligations, except as provided in the plan. *See* 11 U.S.C. § 1141(c) & (d).

each court denied the FCC's requests, determining that a stay was not warranted.[23]

In contrast, the government did not seek a stay from this Court, as it clearly could have. If the government believed the case was worthy of review by this Court, the government could have sought relief from this Court in 1998. It specifically chose not to do so at a time when the market valued GWI's licenses at only $69 million; the reliance of third parties on that decision should not now be disturbed.[24] As the Court of Appeals

23. "A stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization." Pet. App. 23a n.25 (*quoting UNR Indus.*, 20 F.3d at 769-770).

24. Any potential pecuniary gain cannot be the premise upon which the government seeks review in this Court. Congress specifically directed the FCC not to base its actions on revenue generation, but rather to facilitate entry into the market by small businesses in order to prevent a concentration of licenses in the hands of only a few carriers. *See supra* note 2. The Petition suggests to the contrary, however, when the government implies that since it recently received bids of $15 billion when it purported to reauction NextWave's licenses, GWI will somehow be unjustly enriched if its business is not unraveled. Pet. at 26. The relevancy and accuracy of the implication is thoroughly undermined by the facts. The government fails to provide the Court with the relevant context of its recent reauction by omitting that it significantly changed NextWave's licenses by: (a) removing the small business restriction on the licenses to make the majority thereof available to the large, well-capitalized telecommunication conglomerates; and (b) trebling the number of licenses to make them valuable for capacity supplementation by the incumbent carriers rather than for market entry by start-up companies, as originally intended. *See In re Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures*, 15 FCC Rcd. 15,293, 15 FCC Rcd. 21,520, 2000 WL 1140602 at ¶ 55 (rel. August 14, 2000). By way of example, the three top bidders for NextWave's licenses were Cellco Partnership, d/b/a Verizon Wireless (113 licenses), Alaska Native Wireless (backed by AT&T Wireless) (44 licenses) and Cingular Wireless/Salmon Wireless (79 licenses). *See* FCC Official Website, *www.fcc.gov/wtb/auctions*. FCC C- and F-Block Auction #35 (dated as of January 26, 2001). GWI's 14 licenses have not been similarly tripled in number, nor has their small business restriction been removed.

observed, "it appears quite unlikely that we could place the Debtors' estates or third parties back into the status quo as it existed before the avoidance judgment." Pet. App. 29a.

The doctrine of equitable mootness is not simply a judge-made construct of purely equitable pedigree. Rather, it is a carefully crafted standard derived from the text and structure of the Code itself. Because the doctrine is also necessary to fulfill the Code's reorganization objectives, the government's criticisms of its legitimacy are misplaced.

### C. The Courts Below Correctly Applied the Doctrine in this Case.

There can be little doubt that the Court of Appeals' application of the doctrine of equitable mootness in this case was entirely correct. Arguing to the contrary, the government contends that the courts below effectively usurped the FCC's regulatory power by allowing GWI to retain its licenses without paying the FCC's claims in full. The government's argument, however, is baseless.

In 1996, the FCC came to the market to sell PCS licenses, and in this instance, sold fourteen licenses to GWI on credit terms. In accordance with the FCC's financing requirements, GWI made a 10 percent downpayment, and executed notes for the balance of the purchase price payable over a ten year period. In turn, the FCC took liens on the licenses to secure payment of the notes.[25] Thereafter, the FCC precipitated a market crisis that impaired GWI's ability to finance its operations. Only after struggling for months with the consequences of this disaster did GWI file for bankruptcy

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25. GWI's promissory notes were accompanied by security agreements dated March 25, 1997, granting the FCC liens on the licenses. The FCC filed UCC-1 financing statements on April 21, 1997 and May 12, 1997 with the Texas Secretary of State to perfect such liens.

relief. Having decided to engage in a commercial transaction as a creditor with GWI, the FCC cannot now successfully argue that it is somehow immune from the ordinary rules that govern such transactions, including the bankruptcy laws. *See United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996) (" '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.' " (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934))); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 737 (1979) (noting that "Congress . . . did not confer special privileges on agencies that enter the commercial field"); *Cooke v. United States*, 91 U.S. 389, 398 (1875) (noting that when the United States "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there"); *see also United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983) (enforcing the Bankruptcy Code against the IRS and concluding that "[n]othing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector").

In this instance, the transactions between GWI and the FCC concretely demonstrate the existence of a classic debtor-creditor relationship, and as this Court has explained, the adjustment of debtor-creditor relationships lies "at the core of the federal bankruptcy power." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982). While the government insists that the decisions of the courts below interfere with the FCC's authority to issue licenses, in this case, the FCC had already granted the relevant licenses to GWI well before GWI filed its bankruptcy case. Applying ordinary principles of bankruptcy law, the bankruptcy court did nothing more than adjust the FCC's monetary claims.

Ignoring the necessary implications of the debtor-creditor relationship, the Petition implicitly raises license revocation. That remedy, however, was not at issue in this case.[26] The government did not contend that the bankruptcy court lacked jurisdiction to enjoin revocation of GWI's licenses. Pet. App. 29a-30a. ("the FCC properly concedes that its challenge to the authority of the bankruptcy court to permit [GWI] to retain the licenses . . . does not amount to a contention that the bankruptcy court actually lacked *jurisdiction*, as such, to enter any portion . . . of the complained of orders") (emphasis omitted). Rather, the government now simply contends that the bankruptcy court should not have done so on the facts of this case. The government, however, misunderstands that the bankruptcy court did nothing more than the Bankruptcy Code expressly directs.

The government's *ex post facto* characterization of its debt collection motivation is irrelevant. Regardless of whether the payment at issue is labeled "regulatory" or otherwise, § 525(a) of the Bankruptcy Code expressly prohibits the FCC from canceling GWI's licenses on account of GWI's failure to pay the discharged portion of its pre-bankruptcy debt. *See* 11 U.S.C. § 525(a) ("[A] governmental unit may not . . . revoke . . . or . . . condition [the] grant [of a license] to . . . a person that is or has been a debtor under this title or a bankrupt . . . solely because such bankrupt or debtor . . . has not paid a debt that is dischargeable in the case under this title.").[27]

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26. As the government stated in opposing review by this Court in *NextWave*, with respect to GWI, "the issue of automatic cancellation never arose." FCC NextWave Cert. Opposition at 29.

27. Under the Plan, GWI is only obligated to pay the adjusted amount of the FCC's claims. By operation of law, the balance of the FCC's claims that GWI was not obligated to pay under the Plan was discharged upon the Plan's confirmation. *See* 11 U.S.C. § 1141. The FCC does not contest (and did not contest below) the question of dischargeability of its claims. It could not, in fact, credibly do so in light of the applicability of § 1141 to the government pursuant to § 106(a).

By enjoining the FCC from revoking GWI's licenses, the bankruptcy court clearly did not act "illegally" or "usurp" the FCC's function. It simply took action wholly in accord with § 525.

Likewise, the bankruptcy court did not act "illegally" in applying the provisions of § 548 to the FCC's claims. Section 106 of the Bankruptcy Code specifically provides that the federal government's sovereign immunity is waived in actions arising under § 548: "The court may hear and determine any issue arising with respect to the application of [§ 548] to governmental units." 11 U.S.C. § 106(a)(2). Accordingly, the bankruptcy court had the authority to conduct the § 548 action, and further to enter a judgment against the government implementing the result thereof. *See* 11 U.S.C. § 106(a)(3) ("The court may issue against a governmental unit an order, process or judgment under [§ 548]."). [28]

The government cannot dispute the clarity of this provision. Congress knows how to draft regulatory exceptions to the bankruptcy laws when it wishes to, and it did not do so here. [29] *See Bates v. United States*, 522 U.S. 23,

28. The FCC also waived any sovereign immunity in GWI's bankruptcy proceedings by filing proofs of claim against GWI's bankruptcy estates. 11 U.S.C. § 106(b); *see also Doe v. United States*, 58 F.3d 494, 498 (9th Cir. 1995); *In re University Med. Ctr.*, 973 F.2d 1065, 1086 (3d Cir. 1992).

29. *See, e.g.*, 11 U.S.C. § 525(a) (excepting certain actions of the Department of Agriculture from ban on revocation of debtor's licenses); 11 U.S.C. § 362(b)(8) (HUD not prevented by automatic stay from commencing action to foreclose on property in which the mortgage or deed of trust held by the Secretary is an insured multi-dwelling unit); 11 U.S.C. § 362(b)(12) (Secretary of Transportation is permitted to commence or continue action to foreclose on preferred ship or fleet mortgage 90 days after petition filed); 11 U.S.C. § 362(b)(13) (Secretary of Commerce is permitted to commence or continue action to foreclose (Cont'd)

29-30 (1997) (noting that it is "generally presumed that Congress acts intentionally" in the "disparate inclusion or exclusion" of particular language).

At bottom, the government's request for review is rooted purely in its desire for an exemption from the normal application of long-standing principles of bankruptcy law and explicit statutory directives. There is no basis for such a request. Accordingly, the Petition should be denied.

## II. THERE IS NO BASIS FOR REVIEW OF THE SECTION 548 DECISION.

### A. The Government Failed to Preserve for Review Any Question of Value.

In challenging the Section 548 Decision, the government asks this Court to review "[w]hether a bankruptcy court may treat respondents' obligation to pay their $1.06 billion winning bid as a constructive fraudulent conveyance on the basis of that court's own determination of the value of the licenses." Pet. at (I). As framed, however, this question embraces an issue that was not preserved for review.

(Cont'd)
on preferred ship or fleet mortgage 90 days after petition filed); 11 U.S.C. § 362(b)(16) (action by Secretary of Education regarding eligibility of debtor to participate in programs under Higher Education Act excepted from automatic stay); 11 U.S.C. § 742 (providing that SIPC is not bound by automatic stay from liquidating a debtor under the Act); 11 U.S.C. § 761, *et seq.* (providing for regulation of commodity brokers by Commodity Futures Trading Commission); 11 U.S.C. § 1129(a) (providing that a governmental regulatory commission must approve a rate change contained in a debtor's plan of reorganization); 11 U.S.C. § 1129(d) (providing that a debtor cannot confirm a plan whose purpose is avoidance under the Securities Act); 11 U.S.C. § 1145 (providing for regulation of issuance of securities by the Securities and Exchange Commission); 11 U.S.C. § 1161, *et seq.* (providing for regulation of railroad reorganizations by the Surface Transportation Board).

Specifically, the government did not appeal the bankruptcy court's valuation methodology or result, and the bankruptcy court ultimately relied on a different valuation methodology (i.e., its § 506(a) procedure) than the one the government complains of in framing its question (i.e., the § 548 procedure), which the government similarly chose not to appeal below. Accordingly, there is no basis for review of the question as presented.

### B. The Merits of the Section 548 Decision Are Not Worthy of this Court's Review Because the Matter Was Properly Decided, Is Not Likely to Recur, and Cannot Result in the Relief Requested.

#### 1. The Court Below Properly Declined to Defer to the FCC's Self-Serving Interpretation of its Own Regulations.

In addition to challenging the doctrine of equitable mootness, the government contends that, in addressing the date on which GWI became obligated to pay for the licenses for purposes of the Section 548 Decision, the Court of Appeals should have deferred to the FCC's interpretation of its own regulations. Specifically, the FCC argues that the court should have deferred to the FCC's interpretation purportedly establishing that GWI was obligated to pay for its licenses at the close of the auction. Rejecting this contention, the Court of Appeals properly concluded that it was not obligated to defer to the FCC's interpretation because, among other things, the FCC promulgated them well after GWI filed for bankruptcy relief, and after the bankruptcy court had issued the Section 548 Decision.[30]

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30. Currently, the only authority the FCC relies on to support its contention that it issued its interpretation before the Section 548 Decision is the FCC's order in *Matter of BDPCS, Inc.*, 11 FCC Rcd. 14,399 (1996). Pet. at 28. However, as the Court of Appeals correctly pointed out: "Notably, this order does not state that *BDPCS* is, or was ever, obligated to the FCC for the full amount of its bid price." Pet. App. 42a n.35.

As the Court of Appeals made clear, the FCC itself publicly acknowledged that it rendered its interpretation as a direct result of the litigation in this case. Pet. App. 37a-38a (citing *In re Applications for Assignment of Broadband Personal Communications Servs. Licenses*, 14 FCC Rcd. 1126, 1998 WL 889489, at ¶ 1 (rel. December 23, 1998) (stating that the FCC's newly adopted procedure "was made in light of a recent bankruptcy court decision" citing *In re GWI PCS 1, Inc., et al.*, Case Nos. 39739676 through 39739689 (Bankr. N.D. Tex.) (in notes and citations of Order at ¶ 1 n.3)). As the Court of Appeals correctly explained: "In circumstances such as these, where an agency's interpretation occurs at such a time and in such a . . . manner as to provide a convenient litigation position for the agency, we have declined to defer to the interpretation." Pet. App. 38a.

The Court of Appeals' analysis is fully consistent with the relevant case law, including the precedents of this Court. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *see also Waste Control Specialists, LLC v. United States Dep't of Energy*, 141 F.3d 564, 567 (5th Cir. 1998); *United States v. Food, 2,998 Cases*, 64 F.3d 984, 987 n.5 (5th Cir. 1995); *Meadow Green-Wildcat Corp. v. Hathaway*, 936 F.2d 601, 604 (1st Cir. 1991); *Nordell v. Heckler*, 749 F.2d 47, 48 (D.C. Cir. 1984). The government contends that the Fifth Circuit's analysis conflicts with the Second Circuit's opinion in *NextWave*. The Second Circuit's opinion, with respect to which the government opposed review by this Court, rests on jurisdictional grounds. *See NextWave*, 200 F.3d at 55. In contrast, the Fifth Circuit's decision is not jurisdictional, and is fully consistent with the relevant precedents of this Court and other courts of appeals.

Further challenging the Fifth Circuit's analysis, the government raises the ambulatory complaint that the effect of the Fifth Circuit's ruling is unfair. Having nearly been destroyed by the flooding of the market with additional licenses, it is not GWI that has acted unfairly. The government contends that most other C-Block holders have been forced to give up their licenses. But this simply demonstrates the scope of the C-Block catastrophe. The fact that GWI managed to survive the ensuing disaster and is meeting its January 2002 build-out deadline does not justify further review of the judgment of the Court of Appeals.

**2. The Issue Is Not Likely to Recur.**

Although the government now argues to the contrary, the controversy surrounding the date on which GWI became fully indebted to the FCC is not an issue that is likely to recur. As the government recognizes, its predicament arose because of the long delay between the close of the auction and the execution and delivery of the notes and granting of the licenses some nine months later. If GWI had received and paid for its licenses at the end of the auction, the question of a fraudulent conveyance would not have arisen. *See* Pet. App. 130a, 145a. Further, regardless of delay, this case could not have arisen but for the fact that the FCC was also acting as a bank, lending to small businesses. Both of these situations had to arise concurrently for this case to occur.

Acknowledging this, the FCC has abandoned its prior financing program and now insists on full and immediate cash payment upon the grant of a license. The FCC has thus eliminated its role as a creditor. Moreover, taking full advantage of its new procedures, the FCC recently contended in the *NextWave* litigation that review in this Court of the Second Circuit's fraudulent conveyance analysis was not warranted because the chance that the issue "will recur is diminished now that the FCC has eliminated its installment payment program

and requires payment in full before the license issues." FCC NextWave Cert. Opposition at 12 (emphasis omitted). The FCC was correct in this prior statement, and, for precisely the same reason, further review of the matter is not warranted in this case.

### 3. Even if the Government Were Successful in Overturning the Section 548 Decision, the Government May Not Obtain Full Payment of its Claims nor Revoke the Licenses.

In its Petition, the government does not deny that the bankruptcy court was required to adopt some method of valuation for purposes of applying § 506(a) to the FCC's claims. Similarly, the government does not challenge the applicability of this section to its claims. Assuming the validity of the bankruptcy court's § 506(a) valuation methodology (which the government does not contest), application of the court's procedure treats the FCC's secured claim in the same manner as the Section 548 Decision (in both instances the government is entitled to recover $166 million on its secured claim). Hence, even if the Court were to overturn the Section 548 Decision, the treatment of the FCC's secured claims would remain the same. Pet. App. 34a (noting that the FCC's "challenges cannot result in the revocation of the licenses, but rather only in the recoupment of more money by the FCC as an unsecured claim").

Moreover, the government likewise failed to appeal the bankruptcy court's injunction preventing the FCC from canceling the licenses for failure to pay the FCC's claims in full. *Id.* As indicated above, this injunction simply enforces what the Bankruptcy Code already provides. *See* 11 U.S.C. § 525(a) (providing that a governmental unit cannot revoke a debtor's license for failure to pay a dischargeable debt). In this instance, the balance of the FCC's claims not otherwise provided for in the Plan were discharged by operation of law upon the Plan's

confirmation. *See* 11 U.S.C. § 1141. Because the government never appealed this issue, it cannot unravel GWI's right to retain its licenses under the Plan to the detriment of innocent third parties.

In sum, the government's sole recourse in attacking the Section 548 Decision is that, if successful, the government would be entitled to assert an additional unsecured claim against the $18 million Creditors' Fund that GWI has set aside to pay the claims of unsecured creditors. Pet. App. 34a. The government's bare pecuniary interest, however, hardly justifies further review in this Court. Accordingly, the Petition should be denied.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

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# APPENDIX

# APPENDIX A — RELEVANT STATUTES

## 11 U.S.C. § 106

### § 106. Waiver of sovereign immunity.

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

* * *

*Appendix A*

## 11 U.S.C. § 506

**§ 506. Determination of secured status.**

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless —

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

* * *

**11 U.S.C. § 525(a)**

**§ 525. Protection against discriminatory treatment.**

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or

a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

* * *

**11 U.S.C. § 548(a)(1)**

**§ 548. Fraudulent transfers and obligations.**

(a) (1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily —

> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> (B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii) (I) was insolvent on the date that such transfer was made

or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

* * *

**11 U.S.C. § 1101**

**§ 1101. Definitions for this chapter.** In this chapter —

(1) "debtor in possession" means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case;

(2) "substantial consummation" means —

(A) transfer of all or substantially all of the property proposed by the plan to be transferred;

(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.

* * *

**11 U.S.C. § 1111(b)**

**§ 1111. Claims and interests.**

* * *

(b) (1) (A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless —

(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if —

(i) the interest on account of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

* * *

*Appendix A*

## 11 U.S.C. § 1127(b)

**§ 1127. Modification of plan.**

* * *

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

* * *

## 11 U.S.C. § 1141

**§ 1141. Effect of confirmation.**

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d) (1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan —

> (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not —
>
> > (i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;
> >
> > (ii) such claim is allowed under section 502 of this title; or
> >
> > (iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if —

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

* * *

*Appendix A*

## 11 U.S.C. § 1142

**§ 1142. Implementation of plan.**

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

* * *

## 11 U.S.C. § 1144

**§ 1144. Revocation of an order of confirmation.**

On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall —

(1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and

(2) revoke the discharge of the debtor.

* * * *

## APPENDIX B — EXCERPTS FROM BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION IN *NEXTWAVE PERSONAL COMMUNICATIONS, INC., et al. v. FEDERAL COMMUNICATIONS COMMISSION*

No. 00-447

**IN THE SUPREME COURT OF THE UNITED STATES**

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION**

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* * *

*Appendix B*

[12] * * *

. . . Moreover, the likelihood that the precise issue presented by the petition — whether a bankruptcy court may override the FCC's regulatory rule that a winning bidder's failure to make required installment payments on time results in cancellation of its spectrum licenses — will recur is diminished now that the FCC has eliminated its installment payment program and requires payment in full *before* the license issues. See *In re Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures,* FCC No. 00-274, 2000 WL 1140602, ¶ 55 (released Aug. 14, 2000). Accordingly, further review is not warranted.

* * *

[28] * * *

5. Finally, we note that, on October 20, 2000, the Fifth Circuit issued a decision in *GWI PCS 1 Inc.*, No. 99-11294, 2000 WL 1528690. Although that decision rejected the government's challenge to a confirmed plan of reorganization and allowed a C-Block bidder to retain 14 broadband PCS licenses while avoiding much of the debtors' bid obligation, the decision does not directly conflict with the decision below on the issue raised in the petition. Indeed, in *GWI*, the Fifth Circuit rejected the government's challenge to the bankruptcy court's confirmation order not because it disagreed with the Second Circuit's decision in this case, but rather because it found that the government's challenge to the bankruptcy court's ruling had become "equitably moot." That doctrine, the court stated, permitted it to "decline to consider the merits of a confirmation order when there has been substantial

consummation of the plan such that effective judicial relief is no longer available — even though there may still be a viable dispute between the parties on appeal." 2000 WL 1528690, at *5 (citing *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994), cert. denied, 513 U.S. 1152 (1995)). As the Fifth Circuit recognized, 2000 WL 1528690, at *9, equitable mootness principles have no application to the present case, because petitioners' plan of reorganization was never [29] confirmed. Moreover, as noted above, the Fifth Circuit suggested that it might well have agreed with the Second Circuit in this case if the issue were not equitably moot. The Fifth Circuit specifically observed that the bankruptcy court had "possibly erred in permitting avoidance and enjoining the FCC from revoking the * * * debtor's licenses for failing to remit the full bid price, thereby taking onto itself a quasi-regulatory function held by the FCC," *id.* at * 9, and added that, "if the issue [before it] were not equitably moot," it "might agree with the Second Circuit and reverse the bankruptcy court's avoidance judgment," *id.* at * 15 n.31.[19]

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19. In light of those statements, the court of appeals' reference to Section 1334(b) in footnote 29 of its decision hardly creates a conflict. Based on a perceived concession by government counsel, 2000 WL 1528690, at *9, the Fifth Circuit read the Second Circuit's decision as relating not to the bankruptcy's court's *jurisdiction* but rather to its *authority*. Compare Pet. App. 104a (Second Circuit describing decision as "hold[ing] that the bankruptcy court had no authority thus to interfere with the FCC's system for allocating spectrum licenses."). For present purposes, the distinction between the bankruptcy court's authority to set aside the FCC's spectrum licensing decisions and its jurisdiction to do so is immaterial. Regardless of how the matter is characterized, in this case the bankruptcy court erred by arrogating to itself spectrum licensing powers that Congress reserved for the FCC.

*Appendix B*

To be sure, the Fifth Circuit's decision in *GWI* permits a C-Block bidder to retain PCS licenses without satisfying the condition of full and timely payment of the bid amount upon which the licenses were awarded. For that reason, we believe that the decision is difficult to reconcile with fundamental Communications Act principles. But, unlike petitioner, the debtor in *GWI* did not miss any payment deadlines, and sought and obtained judicial approval for a specific payment plan; as a result, the issue of automatic cancellation never arose. Moreover, the Fifth Circuit's rationale for its decision — equitable mootness — is by its terms inapplicable to cases like this one, in which there is no confirmed plan.

* * * *